

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DEWAYNE SLACK,

Defendant-Appellant.

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UNPUBLISHED

December 19, 2006

No. 263266

Barry Circuit Court

LC No. 05-100059-FH

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and conspiracy to assault with intent to do great bodily harm less than murder, MCL 750.157a. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 48 to 180 months. We affirm.

Defendant first asserts that the evidence was insufficient to support his convictions. We disagree. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do great bodily harm to another, i.e., an assault; and (2) an intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Assault with intent to do great bodily harm less than murder is a specific intent crime. *Id.* The requisite intent may be inferred from the surrounding facts and circumstances. *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983). Minimal circumstantial evidence is sufficient to prove that an actor had the requisite intent. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).

Defendant challenges the sufficiency of the evidence to establish the necessary intent. However, we conclude that the evidence was sufficient to support an inference that defendant intended to do great bodily harm. Hayward, the victim, was awakened when his driveway alarm sounded at 5:30 a.m. He discovered a truck driving in his field, and investigated further. The truck's occupants realized that their presence was discovered and left the area. Hayward followed them in his own vehicle for nearly five miles, trying to obtain a license plate number.

There was testimony that defendant and the other occupants of the fleeing vehicle discussed beating Hayward. Snowy road conditions caused the truck in which defendant was riding to slide off of the road. Hayward stopped his vehicle at that point, exited, and had a verbal exchange with Manuel Torres, the driver of the truck. He then attempted to read the truck's license plate number. At that point, Hayward was attacked from behind by Foreman, another occupant of the vehicle. Foreman held Hayward and indicated that defendant and Torres should assault him. Thereafter, defendant braced himself on the back of the truck and deliberately delivered several forceful roundhouse kicks to Hayward's stomach. Torres also struck Hayward over the head several times with a flashlight. The men allowed Hayward to leave only after he begged for his release. He suffered a two-inch cut on his head, an injury to his knuckles, and a ruptured eardrum.

Defendant notes that Hayward was "voluntarily released" after the assault, and that the three men could have "easily chosen to cause great bodily harm" to Hayward if that was their intent; and that because they did not cause more severe injuries, the intent was lacking. We disagree. In reaching our conclusion, we reject defendant's argument that the assault and resulting injuries to Hayward were not severe enough to constitute great bodily harm. Defendant correctly notes that assault with intent to do great bodily harm requires that the assailant intend to cause a "serious and permanent injury," *People v Davis*, 315 Mich 342, 351; 24 NW2d 145 (1946), or to cause a "serious injury of an aggravated nature." *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). Defendant argues that it is unreasonable to infer an intent to cause a greater injury than the injury actually suffered by a victim. Contrary to defendant's argument, however, the critical inquiry is whether a defendant *intended* to cause great bodily harm; thus, "no actual physical injury is required for the elements of the crime to be established." *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992) (emphasis added). Further, the actions of all three men evidence an intent to do great bodily harm less than murder. Hayward testified at trial that he believed defendant was trying to injure him. Defendant's action of bracing himself before forcefully kicking Hayward evidences an intent to employ a more forceful kick to Hayward's stomach. The kicks were numerous. Also, before hitting Hayward with the flashlight, Torres held it behind his head, displaying an intent to use as much force as possible when striking Hayward. Finally, Foreman held Hayward in place in order to ensure that the blows of the other two men hit their intended targets without interference. The assault did not end until Hayward pleaded with the three men "to just let me go" because he had a wife and two kids who needed him at home.

Defendant additionally argues that he, Torres, and Foreman tried to avoid a confrontation with Hayward, who pursued them in his truck and tried to cause a confrontation. However, if a defendant intends to do great bodily harm, "the fact that he was provoked or that he acted in the heat of passion is irrelevant to a conviction. An assault is not mitigated to a lesser offense because of the existence of provocation." *Mitchell, supra*, 149 Mich App 39.

Defendant next challenges his conviction for conspiracy to assault with intent to do great bodily harm less than murder. A criminal conspiracy is an express or implied mutual understanding or agreement between two or more persons to do or accomplish a criminal or unlawful act. *People v Bettistea*, 173 Mich App 106, 117; 434 NW2d 138 (1988). Conspiracy requires proof of specific intent to both combine with at least one other person and to accomplish an illegal objective. *People v Justice (After Remand)*, 454 Mich 334, 346-347; 562 NW2d 652

(1997). Because it is a clandestine crime, “direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties.” *Id.* at 347. We conclude that sufficient evidence was presented to support defendant’s conviction of conspiracy to assault with intent to do great bodily harm less than murder.

Defendant argues that he had no intent to combine with others. However, the record contains sufficient evidence that the assault was planned in advance while the men were trying to flee from the victim. Additionally, “[w]hat the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do.” *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002). The fact that defendant and his codefendants combined to assault the victim in a somewhat organized fashion further supports that an “intent to combine” was reached. There was sufficient evidence of defendant’s intent to combine with others. Further, we reject defendant’s argument that he did not have an illegal objective because the assault and the resulting injuries were not sufficient evidence of an intent to do great bodily harm. We have already concluded that sufficient evidence was presented to support defendant’s conviction of assault with intent to do great bodily harm less than murder. Accordingly, we find that the “circumstances, acts, and conduct of the parties,” when viewed in a light most favorable to the prosecution, were sufficient for a rational jury to find beyond a reasonable doubt that defendant conspired with Foreman and Torres to assault Hayward with the intent to do great bodily harm less than murder. *Hunter*, *supra* at 6; *Justice*, *supra* (After Remand) at 347.

Defendant next argues that he was denied the effective assistance of counsel when his counsel failed to object to the trial court’s scoring of offense variable (OV) 7, MCL 777.37, and OV 10, MCL 777.40, at his sentencing hearing. If raised alone, defendant’s guidelines scoring would not be properly preserved for appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). However, because defendant contends that trial counsel rendered ineffective assistance by failing to object to the scoring of OV 7 and OV 10 at sentencing, appellate review of the scoring issue as it relates to ineffective assistance of counsel is appropriate. *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and that counsel’s representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

“A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A trial court’s scoring decision will be upheld if there is any evidence in the record to support it. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), *aff’d* 473 Mich 399 (2005).<sup>1</sup>

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<sup>1</sup>Although the Supreme Court affirmed, it disagreed with this Court’s analysis of MCL 777.21. See 473 Mich at 410 n22.

MCL 777.37(1) permits fifty points to be scored for OV 7 when a victim was treated with sadism, torture, excessive brutality, or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. The testimony regarding defendant and his accomplices' instruction to the victim to get crawl through the snow to prove that he would leave, satisfies the "any evidence" requirement in support of the scoring. This can reasonably be considered "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.'" *Hornsby, supra*, 251 Mich App at 469, quoting *People v Johnson*, 202 Mich App 281, 289; 508 NW2d 509 (1993).

MCL 777.40(1)(c) provides that the trial court may score five points for OV 10 if "[t]he offender exploited a victim by his or her difference in size, strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(3)(b) defines "exploit" as "to manipulate a victim for selfish and unethical purposes." A zero-point score for OV 10 is scored when "the offender did not exploit a victim's vulnerability." MCL 777.40(1)(d). The statute defines "vulnerability" as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c).

While this is a close call, we conclude that the record supports a conclusion that Hayward was exploited by a difference in strength. He was physically restrained when defendant delivered forceful kicks to his stomach. That Hayward was outnumbered by his assailants supports a conclusion that he was vulnerable to both injury and physical restraint at the time of the assault.

The record contains evidence to support the scores for OV 7 and OV 10. Thus, even had defense counsel objected, the trial court's decision would have been upheld, and defendant cannot prevail with respect to his claim of ineffective assistance of counsel. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002).

Affirmed.

/s/ Donald S. Owens  
/s/ Helene N. White  
/s/ Joel P. Hoekstra